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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

In re Applications of	)	MM No. <u>93-41</u>
	)	
TRIAD FAMILY NETWORK, INC.	)	BPED-910227MD
Winston-Salem, North Carolina	)	
Channel 207C3	)	
	)	
POSITIVE ALTERNATIVE RADIO, INC.	)	BPED-911119MC
Asheboro, North Carolina	)	
Channel 207A	)	
	)	
For Construction Permit for a	)	
New Noncommercial Educational	)	
FM Station	)	

TO: Administrative Law Judge  
Joseph P. Gonzalez

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OPPOSITION TO TRIAD'S SECOND PETITION TO ENLARGE ISSUES  
AGAINST POSITIVE ALTERNATIVE RADIO, INC.

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May 28, 1993

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TABLE OF CONTENTS

Page

Summary . . . . . i

I, TRIAD'S SECOND PETITION IS PROCEDURALLY

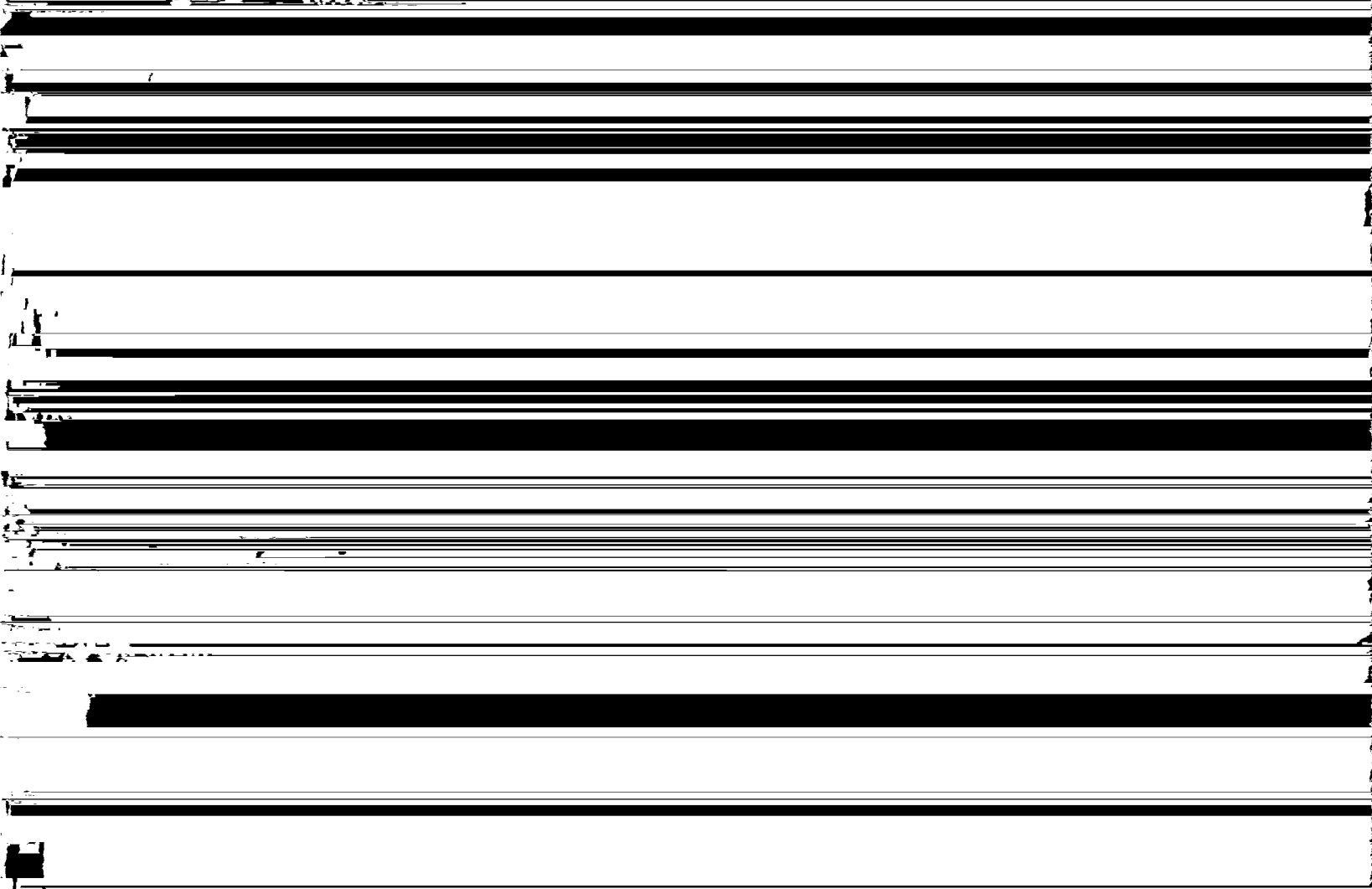
## SUMMARY

By its Second Petition to Enlarge Issues in this proceeding, Triad Family Network, Inc. (Triad) seeks addition of site availability issues against Positive Alternative Radio, Inc. (Radio), based on "newly discovered evidence".

The Presiding Judge has previously denied addition of such issues, from the bench at the pre-hearing conference May 11, 1993 and in a written Order released May 17, 1993. The claimed "newly discovered evidence" was known or could have been discovered by Triad for 15 months, and constitutes no more than a reiteration of contentions previously urged and denied.

Owner of the original site proposed by Radio agreed to its use and thus provided reasonable assurance thereof prior to the filing of Radio's application. Despite reminders of such assurance, he made no effort to deny or contradict Radio's principal or engineer until a year later and after expiration of the B-cutoff date for amendment. An exorbitant price was demanded for use of the proposed site and when Radio declined to pay it, the owner cancelled the agreement.

The Triad Second Petition to Enlarge should be denied (1) as



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TO: Administrative Law Judge  
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**OPPOSITION TO TRIAD'S SECOND PETITION TO ENLARGE ISSUES  
AGAINST POSITIVE ALTERNATIVE RADIO, INC.**

Positive Alternative Radio, Inc. ("Radio"), by its attorneys, opposes the SECOND PETITION TO ENLARGE ISSUES AGAINST POSITIVE ALTERNATIVE RADIO, INC. filed herein by Triad Family Network, Inc. ("Triad") May 13, 1993. In support of its Opposition, Radio shows as follows:

**I. TRIAD'S SECOND PETITION IS PROCEDURALLY DEFECTIVE**

1. By its Second Petition, Triad now seeks another bite at the apple. In its original petition for leave to amend its application to specify a new site, filed with the Presiding Judge March 17, 1993, Radio set forth in some detail its justification for leave to amend, to wit, that it had lost the site for which it

had previously received reasonable assurance from one Edward Swicegood, President of Randolph Broadcasting, Inc., licensee of radio station WKXR(AM), Asheboro, North Carolina. Radio detailed conversations and correspondence between its director, Vernon H. Baker, and Swicegood, leading to the conclusion that reasonable assurance had been secured for use of the WKXR tower by Radio.

2. In an Opposition to Radio's Petition for Leave to Amend, Triad filed March 26, 1993, a pleading disputing Baker's statements concerning the relationship between himself and Swicegood. Triad argued that since the parties had not agreed upon a monthly charge for use of the WKXR tower, there had been no meeting of the minds and the conclusion of reasonable assurance was unjustified.

3. The Presiding Judge in his Order released May 6, 1993 (FCC 93M-222) after duly considering Radio's Petition, Triad's Opposition and the Mass Media Bureau's Comments in Support of Petition for Leave to Amend, granted Radio's Petition and received its amendment. Nevertheless, Triad on May 7, some six weeks after filing its Opposition to Radio's Petition for Leave to Amend, sought to "supplement" its Opposition with a rehash of the material previously filed, and included a "sworn statement"<sup>1</sup> of Edward Swicegood, president of the licensee of WKXR, where Radio proposed to mount its antenna. The Swicegood statement was described as ".

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<sup>1</sup> Triad repeatedly refers to statements attached to its pleadings as "sworn statements" when they are in fact not sworn to at all, but statements under penalty of perjury.

. .which Radio has only recently received" (Supplement to Opposition, p. 5).

4. Commission rules make no provision for pleadings such as Triad's Supplement; accordingly it should have been stricken, however, the Presiding Judge at the Pre-hearing Conference May 11, 1993 granted Radio's Petition for Leave to Amend and simultaneously denied Triad's Opposition (and Supplement):

Judge Gonzales: Well, I just didn't really feel that it [the Supplement] raised any argument, which, which swayed me to, to revisit the matter again. . . (p. 11).

His written Order released May 17, 1993 (FCC 93M-267) affirmed the bench ruling:

1. The Request to Supplement Opposition to Petition for Leave to Amend, filed by Triad Family Network, Inc. on May 7, 1993 was denied on the basis that an Order had been issued on May 4, 1993 granting the Petition in question, and the Presiding Judge saw no reason to revisit the matter. (p. 1)

5. That Order settled or should have settled the matter of Radio's amendment.

6. Now, however, Triad seeks to have the Presiding Judge revisit yet again the matter he previously ruled on from the bench, and affirmed in written Order.

7. Triad attempts now to retry its prior contentions, which were denied by the Presiding Judge when he accepted Radio's amendment. Triad claims "The [second] Petition is being filed within fifteen (15) days from the date when the facts relied upon were discovered by Triad" but such a statement is at best frivolous and at worst false. When Radio filed its initial application

November 19, 1991, it specified use of Swicegood's tower. Thus its plans were public information and readily available to Triad. Long before designation for hearing, Triad filed August 11, 1992 a Petition to Deny Radio's application on technical grounds.<sup>2</sup> A statement from Swicegood could well have been attached at that time, denying "reasonable assurance" on the part of Radio, but significantly in light of subsequent contentions by Triad, it was not. When Radio filed its Petition for Leave to Amend March 17, 1993, it recited the difficulties with Swicegood and his change of mind and indeed included with that Petition, a purported agreement between Swicegood and Baker. If Triad were going to contest the bona fides of Baker's reasonable assurance, it had full knowledge then too, that the source of its objection should be a statement from Swicegood. Apparently Triad made no effort at that time, also, to secure a statement from Swicegood, or even to contact him. For Triad to wait for some eighteen months after Radio specified its site, and some two months after the Presiding Judge denied its first attempt to add a site availability issue and now to come up with a claim of "newly discovered facts" is but an abuse of Commission processes. The "newly discovered facts" could have easily been discovered months ago, with a minimum of diligence by Triad.

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<sup>2</sup> The HDO refused to consider this Petition, on the basis of Revised Processing of Broadcast Applications, 72 FCC 2d 202, 212-215 (1979).

8. The present ploy of Triad, to await decision on its original contentions of a lack of assurance by Radio, and then upon denial of its position, to delay some sixty days before filing another attempt to retry the same arguments, based upon "newly discovered facts" which could have been readily determined months ago, is unconscionable and should be denied forthwith by the Presiding Judge.<sup>3</sup> Triad's Second Petition should be denied if for no other reason, on procedural grounds: (1) the matters contained therein have been previously decided by the Presiding Judge and (2) the "newly discovered facts" were known or could have been reasonably discovered by Triad upon the filing of Radio's application in late 1991, and certainly the statement of Swicegood could and should have been obtained when Radio's initial application to amend (addressed to the Commission's staff) was filed February 8, 1992, and again upon Radio's recitation of the relationship between Baker and Swicegood in Radio's Petition for Leave to Amend filed March 17, 1993, with the Presiding Judge.

**II. RADIO IN FACT HAD REASONABLE ASSURANCE  
FOR USE OF THE SWICEGOOD SITE**

9. Triad cites various cases to the effect that an applicant must in good faith possess "reasonable assurance"; that a binding

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<sup>3</sup> Another interesting point is that Swicegood's statement attached to the Second Petition was dated April 28, 1993, exactly fifteen days prior to the date of filing of Triad's Second Petition, Triad would have the Judge believe that Triad had no knowledge of Swicegood's proposed statement until it was presented.



agreement or absolute assurance is not necessary; that a mere possibility, assumption or hope of availability will not suffice; that an understanding is needed; or that more than a vague

is fallacious in its entirety; Baker made no such statement and gave no such "indication". The inference of Watson was completely unjustified.

11. Indeed, Watson's statement is contradicted by the engineering material he supplied in attempting to support it. His engineer's statement demonstrates that Radio could not serve Charlotte from Swicegood's site. The contention of Watson makes no sense; if Radio wanted to serve Charlotte, it would have filed an application that would put a viable signal over Charlotte, which could not be done from the Swicegood tower. Watson would have the Presiding Judge conclude that Radio filed an application for Asheboro when it really wanted to serve Charlotte, a technical impossibility. Watson's statement is not only contrived, it is also wholly lacking in reasonableness.

### III. SWICEGOOD'S STATEMENT

12. Up to a point, Baker's position and Swicegood's statement attached to Triad's Second Petition are in agreement: they discussed mounting Radio's antenna on the north tower of WKXR, Swicegood's AM station in Asheboro. The conversation was cordial; both are ham-radio operators, etc. They did not discuss price. On November 16, 1991, Baker wrote Swicegood a "Dear Edward 'Eddie'" letter" in confirmation of the previous conversation (Second Petition, Exhibit A), stating:

I gathered from you that we have reasonable assurance that the north tower of WKXR would be available. We would be responsible for all cost regarding the DA antenna adjustment if necessary, and installing isocouplers, etc.

Baker received no reply, no denial of "reasonable assurance" nor any demand, criticism or suggestion. Swicegood's entire course of conduct, from the initial conference, belies his late denial of reasonable assurance.

13. Relying on Swicegood's representations, Radio filed its application November 19, 1991. A Petition to Deny was filed August 11, 1992 by Triad, based upon the Engineering Statement of Triad's engineer, who raised technical objections, and who observed:

Enquiry into just what WKXR thinks of all this may also prove interesting (p. 4).

Thus, Triad's engineer has revealed that he had not discussed his contentions with Swicegood. This was confirmed by the statement of Radio's engineer Peter Gureckis, who, confronted with the first, pre-designation Petition to Deny, recited in Radio's Opposition:

. . .This is in response to the petition filed by Triad Family Network (TFN), an applicant for Channel 207 at Winston-Salem, North Carolina, to deny the application of PAR.

I spoke to Mr. Edward F. Swicegood, President and General Manager of Radio Station WKXR, Asheboro, North Carolina on Monday of this week. He was surprised to hear of the claim of the impossibility to mount a FM antenna on the AM directional tower. He told me that on his south tower, it had a FM antenna mounted on the tower for his FM operation at 20 KW of power. He also told me that the combined operation encountered no major problems and it was licensed by the F.C.C.

A copy of Mr. Gureckis' statement under penalty of perjury is attached hereto.

14. Again, no word was forthcoming to Radio from Swicegood

tower. Obviously this was before Swicegood had changed his mind regarding use of his tower by Radio.

15. That Swicegood had originally granted Baker assurance that his tower would be available is confirmed by the correspondence between them. As aforementioned, Baker's letter of November 16, 1991, is the expression of a potential lessee who understood that he had secured reasonable assurance:

I gathered from you that we have reasonable assurance that the north tower of WKXR would be available.

For more than a year, Swicegood permitted Baker to rely on that conclusion. The only reasonable assumption is that Swicegood agreed that his tower would be available to Radio.

16. Likewise, Swicegood's letter to Baker of November 13, 1992 (Second Petition, Exhibit B) recognizes that the parties had agreed upon the availability of a WKXR tower, and needed only to work out specific terms:

If you are still interested in our tower. I'd like for you to go ahead and send me a proposed rental agreement including your rent proposal. You and I can determine quickly whether we can come to an agreement on terms.

This is unquestionably the letter of a person who has agreed to use of his tower, if the rental terms can be agreed upon.

17. Baker replied 10 days later, and included a proposed contract (Second Petition, Exhibit C). The parties progressed further toward agreeing - not upon whether Swicegood's site would be available (they had already agreed on that) - but on the question of quid pro quo for its monthly rental. Swicegood's counterproposal (Second Petition Exhibit D) of \$1200 per month was

rejected as exorbitant by Baker, but Swicegood recited in his letter of January 6, 1993 (Second Petition, Exhibit E) that he had expected Baker "to present an acceptable proposal" by January 4, 1993, thus conceding that he was willing to talk price - not availability - up to that date.

18. For Triad to now contend that Swicegood never intended to provide Radio with reasonable assurance for use of the WKXR tower transcends reason. From the very first contact between Baker and Swicegood, the latter had assured Baker that he could use a WKXR tower, their minds met on the question of availability, if not on price or term of lease because those factors had not been discussed. Not until Swicegood stated in his January 6, 1993 letter did he "consider our discussions closed."

19. Indeed, can there be any doubt that if Radio had accepted Swicegood's \$1200 per month offer there would have been a binding agreement between them?

20. As a broadcaster of more than 20 years' experience, Baker knew that prior to filing an application for a new station, he

(Baker) had not secured reasonable assurance of use of the WKXR site, he would have amended his application to specify another site. The B-cutoff list that included Radio's application (copy attached) provided that an amendment of right could be filed up to August 11, 1992, so Baker had ample time to suggest a new site. He did not do so because (1) Swicegood had initially assured him that his tower would be available and (2) Swicegood had done nothing to dispel that assurance when reminded of it by Baker and his engineer.

21. As may be pertinent, Baker has attached to this Opposition a statement reflecting several inaccuracies in the "Sworn Statement of Edward Swicegood" (Second Petition, Exhibit A). Swicegood alleges that he received in September 1992 "a short letter from Mr. Baker . . . I have attached a copy of that letter as Exhibit A", but Swicegood's Exhibit A is Baker's letter of November 16, 1991, confirming the availability of WKXR tower. No September 1992 letter from Baker was ever produced.

22. Swicegood states that ". . . Mr. Baker's letter [of March 23, 1992] ignored my request [of November 13, 1992] that he make a rent proposal"; however, Swicegood attaches as the second page of his Exhibit C, a specific agreement from Baker, which Swicegood has labelled in handwriting "in response to my letter of Nov. 13, 1992." Swicegood received this agreement and in return dispatched to Baker the \$1200 per month letter referred to above, which not only confirmed that the WKXR site was available, but also volunteered a specific price and specific terms.

23. Baker's attached statement, under penalty of perjury, shows that contrary to Swicegood's statement, the latter did not mention during their telephone conversation that he had to talk to his lawyer, engineer or stockholder; that he "would try to work out something in the future"; that Swicegood did not propose December 10, 1992 (or any other day) that he would "drop our request that payments be made between that date and the start of construction, with the exception of the first year's rent, which would be retained by Randolph Broadcasting in any case." Dr. Baker's attached statement shows further that Swicegood's recital that Baker called him in March 1993 and asked if he, Swicegood, would reconsider his proposal, is correct but neglects to state that for the first time he (Swicegood) stated that he was terminating the ongoing discussions (of price and terms).

#### IV. WATSON'S STATEMENT

24. With respect to Watson's statement (Second Petition, Attachment B), Dr. Baker has pointed out that Watson was apparently confused in suggesting that there was a "available frequency on 89.3", as that is the channel specified by both Triad and Radio, and that any impression that Watson had that Radio intended to serve Charlotte is completely in error. Triad's engineer has confirmed the technical impossibility of Charlotte service from Asheboro.

25. Watson's statement is irrelevant to whether Baker received reasonable assurances from Swicegood for use of the WKXR site, and should be disregarded by the Presiding Judge.

## V. CONCLUSION

Triad's most recent attempt to add a site availability issue must again be denied, for the following reasons:

1. The Presiding Judge considered the arguments raised in Triad's Supplement and declined, from the bench and in a written Order, to revisit his prior rejection of them.
2. The additional material included in the Triad Second Petition was not "newly discovered" and was known or could have with reasonable diligence been known to Triad for some 15 months.
3. The conclusion is inescapable that Swicegood provided reasonable assurance that his site was available to Radio and despite being reminded of this, did or said nothing until more than a year later to disabuse Radio of its reasonable assurance.



Respectfully submitted,

POSITIVE ALTERNATIVE RADIO, INC.

By   
Julian P. Freret  
Its Counsel

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May 28, 1993

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for reasons unknown to Radio, Swicegood changed his mind about the availability of his tower and proposed an exorbitant rental price and terms, reasonably confident that Radio would not agree. Triad then followed up with its Opposition to Radio's Petition to Amend to another site, its "Supplement" to that Opposition and its Second Petition to Enlarge. That Triad in some manner orchestrated Swicegood's change of heart is inescapable.

STATEMENT OF PETER GURECKIS

The following statement is made under penalty of perjury this



# PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION  
1919 M STREET N.W.  
WASHINGTON, D.C. 20554

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News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

NON-COMMERCIAL EDUCATIONAL FM BROADCAST APPLICATIONS  
ACCEPTED FOR FILING AND NOTIFICATION OF  
CUT-OFF DATE

Report No. B-146

Released: July 7, 1992

CUT-OFF DATE: August 11, 1992

NOTICE is hereby given that the applications listed in the attached appendix are accepted for filing. Because the applications listed in the attached appendix are in conflict with applications which were accepted for filing and listed previously as subject to a cut-off date for conflicting applications, no application which would be in conflict with the applications listed in the attached appendix will be accepted for filing.

Petitions to deny the applications listed in the attached appendix and minor amendments thereto must be on file with the Commission not later than the close of business on the cut-off date. Any application previously accepted for filing and in conflict with the applications listed in the attached appendix may also be amended as a matter of right not later than the close of business on the cut-off date. Amendments filed pursuant to this notice are subject to the provisions of Section 73.3573 of the Commission's Rules.

Attachment

F C C

# APPENDIX

BPED -920325MB	NEW Flint	MI
	National Inspirational Broadcasting, Inc.	
	REQ: 88.900 MHz; Channel No. 205A	
	Exp: 3.00 KW; Haat: 80 M	
BPED -911119MC	NEW Asheboro	NC
	Positive Alternative Radio, Inc.	
	REQ: 89.300 MHz; Channel No. 207A	
	Exp: 2.5 KW; Haat: 120 M	
BMPED -910726IL	WPGB Blountville	TN
	Blountville Education Association, Inc.	
	REQ: 88.300 MHz; Channel No. 202C2	
	Exp: 1.5 KW; Haat: 652 M	

F C C

## STATEMENT OF VERNON H. BAKER

I am a Director of Positive Alternative Radio, Inc., an applicant for FM Channel 207A at Asheboro, North Carolina. I have read the statements of Edward Swicegood and of Philip T. Watson, attachments to a pleading entitled Second Petition to Enlarge Issues Against Positive Alternative Radio, Inc., and offer the following comments, based upon my best recollection of conversations and events that occurred a year and a half ago.

## Swicegood Statement

Mr. Swicegood's statement is in part correct and in part in error, but the general tenor of it is completely opposite to what was actually said and done.

I did in fact call Mr. Swicegood as he relates, but I stated only that I needed a transmitter site and faced a deadline. I did not say that I needed an answer that night.

Mr. Swicegood did not state that he "really needed to talk" with his engineer, lawyers and/or other stockholders, and could not give me an answer at that time. On the contrary, he indicated that there would be no problem with Radio using his north tower for its FM operation. I stated nothing that indicated that I proposed anything less than use of his tower for Radio's operation; or that I need his site "for purposes of filing [Radio's] application". Mr. Swicegood is mistaken in stating that I stressed that I "needed something to put in [Radio's] application". Apparently Mr. Swicegood would have the Commission believe that I wanted use of his site solely for the purpose of filing an application. Had that been the case, I would have amended the Radio application after filing it. I understood that I had secured reasonable assurance from Mr. Swicegood that I had not so understood I would have

sought another site. As an experienced broadcaster of some 15

Finally, Mr. Swicegood's statement that I called him "sometime around March 11 or 12, 1993" and asked him to reconsider his proposal is true, but he stated that he did not want the Radio antenna on his tower under any conditions, thus confirming that his previously granted assurance of availability had been cancelled.

#### WATSON STATEMENT

Mr. Watson's statement is both confused and confusing. He states that he called me June 25, 1992 and that "We addressed each other by first names." We in fact addressed each other as Dr. Baker and Mr. Watson, a small matter, but incorrect. The statement that I admitted surprise "that there was an available frequency on 89.3" could not be true as I had on file for Radio an application for Channel 89.3 (Channel 207).

The statement that I "indicated" I had in mind making Radio's station "a higher power FM station directed toward serving Charlotte" is a misconception on the part of Watson, as I had no such idea, and knew full well that I could not hope to serve Charlotte from a proposed Asheboro station. This is confirmed by the Engineering Statement of Triad's engineer, who recognized that such a proposal would be technically impossible under Commission rules.

Watson has telephoned to me and to my consulting engineer during the past week or two, in an effort to settle this case, and I assured him that I would propose a channel change and site change for Radio, all in an effort to remove the mutual exclusivity between our applications and permit both to be granted.

The foregoing is true and correct under penalty of perjury.

Dated this 28<sup>th</sup> day of May, 1993.

Vernon H. Baker  
VERNON H. BAKER, Director  
Positive Alternative  
Radio, Inc.

**CERTIFICATE OF SERVICE**

I, Margaret A. Ford, Office Manager of the law firm of Booth, Freret & Imlay, do hereby certify that copies of the foregoing OPPOSITION TO TRIAD'S SECOND PETITION TO ENLARGE ISSUES AGAINST POSITIVE ALTERNATIVE RADIO, INC. were mailed this 28th day of May, 1993, to the offices of the following:

\*Administrative Law Judge  
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\* Via Hand Delivery